App. F. IX-4

Previous References
Law 23-28-1-9

1934
(Law)

File No. 93-34
Serial Nos. 1-3

Later References.

(13)

GENERAL AND REVENUE SECRETARIAT.

Serial Nos. 71 Nil

Part B for Aug '35

SUBJECT.

R. A 35/28-29 on the file of the H.el:-(Rushya Sringeswara swamy temple by the D.C. Kadur Vs. Gowramma)

.3) To Mr L.C. Kadur

WD 01965—GPB—15,000—7-7-34

RO. 2479 of 26.11.34.
Pls. a copy of the judgment for information & necessary action..

M. Abdul Aziz
25-8-35

1467 P 334

OFFICE OF THE GOVERNMENT ADVOCATE
IN MYSORE,

Bangalore,.....7th....September...*1934*..

Law 93-34-1

FROM

A. R. NAGESVARA IYER, ESQ., B.A., B.L.,
GOVERNMENT ADVOCATE IN MYSORE,
BANGALORE.

The General Secretary to the Govt.
of H. H. The Maharaja of Mysore,
BANGALORE.

Refer
Bond
1879

SIR,

With reference to Government Order No. P.2080-2/Law.23-28 dated the 6th October 1928, I have the honor to state that Regular Appeal No. 35 of 1928-29 on the file of the High Court of Mysore, (Sree Rushyasringeswara Swami Temple by the Deputy Commissioner, Kadur District VS. Gowramma) came on for hearing on 30-8-1934, and after hearing arguments Judgment was pronounced modifying the decree to a small extent with respect to item 17 of the Plaint Schedule, and otherwise dismissing the Appeal with costs. The Memo of Cross Objections filed by the Respondents was also dismissed with costs.

2. A copy of the Judgment has been applied for and the same will be sent to you as soon as it is received in this office.

I have the honor to be,
Sir,
Your most obedient servant,

A. R. Nageswara Iyer

2647/934

In reply please refer to
No. 427

OFFICE OF THE GOVERNMENT ADVOCATE
IN MYSORE,

Bangalore, 7th November *1934.*

Law 93-34-2

FROM

A. R. NAGESVARA IYER, ESQ., B.A., B.L.,
GOVERNMENT ADVOCATE IN MYSORE,
BANGALORE.

GENERAL SECRT. I.
13 NOV. 19

The General Secretary to the Govt.
of H. H. The Maharaja of Mysore,
BANGALORE.

BANGALORE CIVIL
SECOND MEMBER OF
20 NOV. 1934
No. 3626

SIR,

In continuation of this office letter No.221, September dated the 7th ~~October~~ 1934, I have the honor to forward herewith, for the information of Government, a copy of the Judgment passed in Regular Appeal No.35 of 1928-29 on the file of the High Court of Mysore, (Rushyasringeswara Swami Temple by the Deputy Commissioner, Kadur District VS. Gowramma).

I have the honor to be,
Sir,
Your most obedient servant,

Government Advocate.

Submitted for perusal
ISD 19/11 Secy)
Secy Minister.

CSN.

19.11.34

IN THE HIGH COURT OF MYSORE AT BANGALORE.

Thursday the 30th day of August 1934.

PRESENT

MR. H. D. C. REILLY, CHIEF JUSTICE

and

MR. JUSTICE A. S. R. CHARI.

REGULAR APPEAL NO. 35 OF 1928-29.

with memorandum of Cross-Objections.

Rushyasringeswaraswamy
by the Deputy
Commissioner, Kadu
District. ..Plaintiff .. APPELLANT

- Vs

Gowramma .. 3rd Defendant RESPONDENT

Regular Appeal against the decree of the Subordinate Judge of Shimoga in Original Suit No.8 of 1923.

This appeal coming on for hearing this day, the Court delivered the following:-

JUDGMENT.

30th August 1934. THE CHIEF JUSTICE:-

This is a suit upon a mortgage-deed, Exhibit A, dated the 23rd of April 1917 and executed by Defendants 1, 2 and 3, Defendant 3 who was then a minor, being represented by her father as her guardian, the purpose of incurring the mortgage-debt being to satisfy the decree, Exhibit II, in Original Suit No.5 of 1903-04 on the file of the Subordinate Judge of Chickmagalur, which was made against the present Defendant 2's father, Devara Sastry, as manager of his undivided family on a mortgage-deed executed in 1885 by Devara Sastry and his elder brother and predecessor as manager of the family, Seetharama Sastry, whom I will call Seetharama Sastry Senior That decree, Exhibit II, was made against the morgaged property, the property of the family and the separate property of Seetharama Sastry senior, and its date was the 29th of February 1904. In the present suit the Subordinate Judge has made a preliminary decree for sale of the property included in the mortgage-deed of 1917, Exhibit A, except items 15 to 25, and he has exonerated Defendant 3, who claims those items. The Plaintiff appeals against that decree so far as items 15 to 25 have been excluded from it.

Defendant 3 is the widow of Seetharama Sastry junior, who was the grandson of Seetharama Sastry

senior

senior and who died in 1916, while he was still a minor. Defendant 3 in this suit pleaded that her husband, -- Seetharama Sastry junior, had been divided from the other branches of the family, now represented by Defendants 1 and 2, and that on the date of Exhibit A, when her father joined in executing it as her guardian, the decree in the previous suit, Exhibit II, could not be executed, being more than 12 years old. Although partition after the date of Exhibit II could not exonerate the part of the family property which came to Defendant 3's husband by the partition, her father as her guardian could not validly mortgage her interest to satisfy a time-barred debt. In reply to that contention the Plaintiff made a rather curious statement, viz., "the Plaintiff does not know that the decree in Original Suit No.5 of 1903-1904 was time-barred". The only issue which the learned Subordinate Judge framed on Defendant 3's contentions was No.5:-

"Is the share of the 3rd Defendant not liable for the suit debt as pleaded?"

On that issue he found that the decree in the previous suit, Exhibit II, was time-barred at the date of Exhibit A. It has been urged before us for the Plaintiff that there was not sufficient evidence for the Subordinate Judge to arrive at that finding. But it is very remarkable, I think, that the Plaintiff did not trouble to produce any evidence to show that at the date of Exhibit which was more than 12 years after the date of the decree in the previous suit, Exhibit II, that decree was not time-barred for the purpose of execution because some execution petition was still pending. If no execution petition was pending on the date of Exhibit A, a mere

mere arithmetical calculation was enough to show that that decree was time-barred. It would have been a very simple matter for the Plaintiff to produce a copy of some Court record to show that on the date of Exhibit A there was an execution petition, presented in time, before the expiry of the 12 years from the date of Exhibit II, which kept that decree alive even on the date of Exhibit A. But he did not take the trouble to do so. Mr. Nageswara Iyer for the Plaintiff has pointed out to us that Exhibit A implies that the decree in the previous suit, which Exhibit A was intended to satisfy, was still alive. There are words in Exhibit A which imply that; and, as he has pointed out, there is some serious improbability in the senior members of the family executing Exhibit A if the decree which it was to satisfy was time-barred. But nevertheless, as the Plaintiff failed to produce the evidence, which must have been available to him if the decree in the previous suit was not time-barred on the date of Exhibit A, I do not feel inclined in the circumstances to differ from the finding of the learned Subordinate Judge that on the date of Exhibit A the decree in the previous suit was time-barred.

However, that is not of very great importance, because the learned Subordinate Judge has found that the family was undivided, and in that case there was no necessity for Defendant 3, the widow of one of the members of the family, to have been brought into the execution of Exhibit A at all and she had no widow's interest to defend in any part of what had been the family property. It is a very curious thing that she does appear in Exhibit A as an executant. That by itself certainly implies that there had been a division

in the family. Otherwise I can see no possible object in bringing her in as an executant represented by her father. However there is the finding of the learned Subordinate Judge that the family was undivided, and that has not been disputed before us.

Defendant 3 before the Subordinate Judge succeeded on quite another point, which had not been raised in her written statement. She succeeded on the ground that, although her husband died an undivided member of his family, items 15 to 25, in which she claimed an interest, were the separate property of her husband and not part of the family property at all, and so could not be mortgaged, when she was a minor, by her father as her representative for a family debt. If those items were the separate property of her husband, in which she had a widow's estate after his death, her father, while she was a minor, would certainly have had no right to mortgage them for a family debt. The evidence on which the learned Subordinate Judge found that items 15 to 25 were the separate property of Seetharama Sastry Junior, Defendant 3's husband, was mainly Exhibits III and IV. Exhibit III is a gift-deed, dated the 10th of March ~~1904~~ 1911, which includes all these items 15 to 25 with one small exception, which I will mention later. That gift-deed is a registered document, executed by Defendant 3's father, who it appears was the maternal uncle of Seetharama Sastry Junior, and by one Venkatakrishnappa also a close relation of Seetharama Sastry Junior. Exhibit IV is a sale-deed, dated the 4th of October 1896, under which Defendant 3's father bought the greater part of the property included in the gift-

gift-deed, Exhibit III, from one Ramappa. It may be noticed that Exhibit IV recites that Ramappa got his right to the items included in that sale to Defendant 3's father in a Court-sale held in execution. Exhibits III and IV are registered documents, and, if they cannot be attacked or explained, they certainly show that items 15 to 25, with the slight excpption which I have mentioned, were the separate property of Defendant 3's husband. And I may mention that it is admitted that those items stood in the khata of Defendant 3's husband while he was alive and after his death were transferred in the revenue register to the name of Defendant 3. What is suggested against Exhibits III and IV is that they may possibly be explained by some attempt of some previous member of this family to hide away some items of the family property from their creditors by a sham sale after which by another sham sale they filtered back to Defendant 3's father and by the gift-deed executed by him and Venkatakrishnappa to Seetharama Sastry junior. That seems a rather difficult story to make out,-- especially when we remember that the bulk of these items were bought by Defendant 3's father so long ago as 1896 from a man who had got them in a Court-auction However the Plaintiff not unreasonably makes it a grievance that Defendant 3 was able to succeed in her suit by means of Exhibits III and IV, when she set up a story, which she never mentioned in her written statement and which was not directly the subject of any issue in the suit. Indeed Defendant 3's conduct in suit is even more curious than that. Though the suit was filed in 1922, these two documents, Exhibits III and IV, were not produced in Court until December 19

For the Plaintiff it is urged that he ought to have had an opportunity, when Defendant 3 changed her case in that way and produced these two documents at such a late stage, to bring rebutting evidence, although his oral evidence had been closed some time before. And I think, if the Plaintiff had made such an application when Exhibits III and IV were produced in December 1927, he could not properly have been refused that opportunity; and perhaps it is possible to go further and say that, if he had objected in December 1927 to the introduction of those documents into the case at such a late stage, he would have had a strong ground for his objection. But the record shows that no objection nor application for further evidence was made by the Plaintiff till long after December 1927. On the 13th of December 1927 these two documents were referred to in the evidence of P.W.3, and some attempt was made to cross-examine him about them. After that there appears to have been a long interval in the trial, and Defendant 3 was examined as the last witness in the case on the 6th of June 1928. After that the case was posted for arguments on several days but not taken up until 19th of June 1928, when it appears that arguments went on for three hours and were not finished. The hearing was then adjourned to the 21st of June 1928, when the arguments were concluded. On that very last day an application was made by the Plaintiff that he should then be allowed to produce rebutting evidence in regard to Exhibits III and IV to show that they were sham and nominal documents. The learned Subordinate Judge dismissed that application on the ground that it was belated and I cannot see how we can regard that order as anything but a

proper

proper one in the circumstances. The Plaintiff may urge that he was taken by surprise by the introductio of these documents to prove a new case for Defendant 3 But it was entirely unreasonable to ask after arguments were nearly concluded, six months later, that h should then have an opportunity to call fresh evidenc It is on the ground that the Plaintiff had no proper opportunity to meet Exhibits III and IV that this appeal is mainly urged before us. In my opinion that ground cannot be successfully sustained in the circumstances.

In my opinion this appeal must be dismissed except in one small respect. It appears that out of the -- 11 items with which we are concerned, Nos.15 to 25, the plaint schedule, part of No.17, a garden measu 9 guntas, was not included in Exhibit III. So fa as that part of item 17 is concerned, there was no sufficient reason why Defendant 3 should have succeeded. In my opinion the decree of the learned Subordinate Judge should be modified by adding that part of item 17 on the schedule of the plaint to th items made liable to sale by the decree. But, as th Plaintiff has succeeded in such a very small fracti of his claim in this appeal, I think that he should the whole of Defendant 3 costs here.

There is a memorandum of cross-objections on ground that the learned Subordinate Judge ordere Defendant 3 to bear her own costs in his Court. He did so because her conduct in the suit was so imp and she succeeded on a case which she never put forward in her written statement. It would be

entirely improper for us now to interfere in her favour with such a reasonable order as that she should pay her own costs in the Subordinate Judge's Court. In my opinion the memorandum of objections should be dismissed with costs.

Sd/- H. D. C. Reilly,
Chief Justice.

Mr. Justice Chari:-

I a g r e e.

Sd/- A. S. R. Chari,
JUDGE.

"C O P Y"

Deputy REGISTRAR.

Sir

with reference to the Correspondence ending with the S.O. no. 8 recovering Law wrong dated 6th Dec 1920 pertaining an appeal against the Judgement and decree of Sub-Jr

GOVERNMENT OF HIS HIGHNESS THE MAHARAJA OF MYSORE

General and Revenue Secretariat

Dated, Bangalore, 24th November 1934

From

The *General Secretary to the Government of His Highness the Maharaja of Mysore.*

To

The Deputy Commissioner,
Kadur District

Sir,

With reference to the correspondence ending with the Government Order No.P.2080-2/Law.23-28-9 dated 6th October 1928 sanctioning an appeal against the Judgment and decree of the Sub-Judge, Shimoga in O.S.No.8/23 24. I am directed to forward herewith for information and necessary action a copy of the Judgment in R.A.35/28-29 on the file of the High Court of Mysore.(Rushya Sringeswaraswamy Temple by the Deputy Commissioner, Kadur Vs. Gowramma)

I have the honour to be,

Sir,

Your most obedient servant,

for General Secretary to Government.